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IN THE

Supreme Court of the United States

October Term, 1949.

No. 295

PHILLIP HIMMELFARB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

WILLIAM KATZ,
415 Chester Williams Building, Los Angeles 13,
Attorney for Petitioner.

The Myers Legal Press, Los Angeles. Phone VAndike 9207.



TOPICAL INDEX.

PAGE

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and brief in support thereof 1

Opinion below 2

Jurisdiction 2

Summary of matters involved 2

Questions presented 9

Specification of errors to be urged 11

Reasons for granting writ 13

Brief in support of petition for writ of certiorari 17

I.

The Court of Appeals erred in holding that a communication by a client or his attorney to a certified public accounntant employed by such attorney was not confidential and privileged 17

II.

The court of appeals erred in sanctioning and considering the opinion and conclusion of an internal revenue agent, based wholly upon matters dehors the record and hearsay, and formed as a result of an ex-parte investigation that petitioner had received additional unreported income for the year 1944 23

III.

The court of appeals erred in disregarding the agreement and understanding made and had by counsel for the government, the trial court and counsel for the respective defendants at the very commencement and continuing throughout the trial of the case, that all evidence offered by the government and received in evidence was offered and received against one of two defendants only, unless govern-

PAGE

ment counsel avowed or indicated that the evidence was offered against the other of such two defendants, or against both defendants 26

IV.

The court of appeals erred in holding that the misconduct of counsel for the government in arguing to the jury that petitioner failed to produce certain witnesses did not constitute reversible error..... 31

V.

The court of appeals erred in holding that counsel for the government was not guilty of misconduct in referring to other asserted offenses in his argument to the jury..... 34

VI.

The court of appeals erred in holding that the admission of bank records, which were not in any way connected with the offense charged, did not constitute error..... 38

VII.

The admission in evidence of net worth statements which were not in any way connected with the offense charged, constituted reversible error 41

VIII.

The court of appeals erred in finding and holding that the evidence adduced against petitioner was sufficient to support the verdict and judgment..... 43

Conclusion 46

Appendix "A"—Agreement and understanding of court and counsel respecting admission of evidence.....App. p. 1

Appendix "B"—Excerpt from testimony of internal revenue agent, J. Bryant Eustice.....App. p. 4

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Aluminum Co. of America v. Cold Metal Process Co., 7 F. R. D. 684	20
August v. United States, 257 Fed. 388	37
Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629	37
Bollenbach v. United States, 326 U. S. 607	33, 42
Bowman v. Norton, 5 C. & P. 177, 24 E. C. L. 265, 172 Reprint 929	19
Brand v. Brand, 39 How. Pr. 193	20
Churton v. Frewen, 2 Dr. & Sm. 390, 62 Reprint 659	20
Denner v. United States, 147 F. 2d 286	44
Fiswick v. United States, 329 U. S. 211	33, 42
Fitter, et al. v. United States, 258 Fed. 567	37
Fontanello v. United States, 19 F. 2d 921	37
Gleckman v. United States, 80 F. 2d 394	16, 40, 45
Hackfeld & Co. v. United States, 197 U. S. 442	14, 30
Hargrove v. United States, 67 F. 2d 820	45
Hawes v. State, 7 So. 302, 88 Ala. 37	20
Hickman v. Taylor, 329 U. S. 495	20
Indianapolis v. Scott, 72 Ind. 196	20, 21
Ippolito v. United States, 108 F. 2d 668	37
Jackson v. French, 3 Wend. 337, 20 Am. Dec. 699	20
Karchmer v. United States, 61 F. 2d 623	44
Kassin v. United States, 87 F. 2d 183	44
Kirsch v. United States, 174 F. 2d 595	25
Kittrell v. United States, 79 F. 2d 259	15, 40
Kotteakos v. United States, 328 U. S. 750	33, 42
La Lance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563	13, 18, 20
Landsberger v. Gorham, 5 Cal. 450	20

PAGE

Latham v. United States, 226 Fed. 420 37
LeLong v. Siebrecht, 187 N. Y. Supp. 150, 196 App. Div. 74 21
Lewis v. Lanbros, 58 Mont. 555, 194 Pac. 152 31
Lewis v. United Airlines Transp. Co., 32 Fed. Supp. 21, 23 20
Leyner v. Leyner, 98 N. W. 628, 123 Iowa 185 21
McFarlane v. Rolt, 14 Eq. 580, 27 Law Times Reports 305 21
McKnight v. United States, 97 Fed. 208 ..... 15, 32
McKnight v. United States, 115 Fed. 972 32
Pacific R. R. v. Ketchum, 101 U. S. 289 ..... 14, 31
Parkins v. Hawkshaw, 2 Stark Rep. 239 20
Pasco Holding Co. v. Wells, 126 Fla. 339, 171 So. 674 31
Philadelphia Fire Assn. v. Fleming, 3 S. E. 420, 78 Ga. 733 21
Richenberg v. Capital Garage, 68 Utah 30, 249 Pac. 121 31
Ried v. Langlois, 2 Hall. & T. 59, 47 Reprint 1596 21
Robilio v. United States, 291 Fed. 975 32
Russell v. Jackson, 9 Hare 387, 41 Eng. Ch. 387, 68 Reprint 558 21
Sibley v. Waffle, 16 N. Y. 180 20
Sischo v. United States, 296 Fed. 696 37
Skuy v. United States, 261 Fed. 316 ..... 32, 37
State v. Loponio, 88 Atl. 1945, 85 N. J. Law 357, 49 L. R. A. (N. S.) 1017 21
Steele v. Stewart, 1 Phill. 471 20
Taylor v. Forster, 2 C. & P. 195, 12 E. C. L. 85, 172 Reprint 89 19
Tinkoff v. United States, 86 F. 2d 868 45
Turner v. United States, 35 F. 2d 25 37
United States v. Johnson, 63 S. Ct. 1233, 319 U. S. 503 ..... 14, 25
United States v. Negro, 164 F. 2d 168 ..... 33, 42
United States v. Schenck, 126 F. 2d 702 45
United States v. Sprengel, 103 F. 2d 876 37

PAGE

Walsham v. Stainton, 71 Reprint 357, 2 Hem. & M. 1.....19, 21
Weathers v. United States, 117 F. 2d 585..... 37
Webb v. Lewald Coal Co., 4 P. 2d 532, 214 Cal. 182, 77 A. L. R. 675 21
Williams v. United States, 168 U. S. 382, 42 L. Ed. 509, 18 S. Ct. 92.....15, 37, 40
Willman v. Forster, 46 Cal. App. 359..... 31

STATUTES

26 Federal Rules of Criminal Procedure 22
Internal Revenue Code, Sec. 145(b) 1, 2
Internal Revenue Code, Sec. 188 43
Judicial Code, Sec. 269 33
28 United States Code, Sec. 391 33
28 United States Code, Sec. 1254, Subd. 1..... 2
18 United States Code Annotated (following Sec. 687)..... 22
26 United States Code Annotated, Sec. 145(b) 1, 2
26 United States Code Annotated, Sec. 188..... 43

TEXTBOOKS

Greenleaf on Evidence, 16th Ed., Vol. 1, p. 375..... 20
Taylor on Evidence, 12 Ed., Vol. 1, p. 581..... 20

IN THE

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October Term, 1949.

No. .....

PHILLIP HIMMELFARB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Your petitioner, Phillip Himmelfarb, respectfully petitions your Honorable Court that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on the 3rd day of June, 1949, affirming a judgment of the United States District Court for the Southern District of California, Central Division, convicting your petitioner of a violation of Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. 145(b)—attempt to evade payment of income taxes.

Opinion Below.

The opinion of the Circuit Court of Appeals is as yet officially unreported, but has been printed as part of the record herein and appears at pages 1645-1707, incl.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on the 3rd day of June, 1949 [R. 1708]. A petition for rehearing was thereafter filed, which was by said Circuit Court of Appeals denied on the 1st day of August, 1949 [R. 1710]. Jurisdiction of this Court is invoked under 28 U. S. C. 1254, subdivision 1.

Summary of Matters Involved.

Petitioner and one Sam Ormont, were jointly indicted in the United States District Court for the Southern District of California, Central Division, on January 22, 1947, for allegedly attempting to evade the payment of income tax, in violation of Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. 145(b) [R. 2].

Petitioner was named in two counts of the indictment; namely, Count I, in which he and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by Sam Ormont for the calendar year 1944, and Count II, in which petitioner and Sam Ormont were jointly charged with attempting to evade the payment of income tax allegedly due and owing by petitioner for the calendar year 1944 [R. 2, 3].

Petitioner interposed a plea of "not guilty" to both Counts I and II of said indictment [R. 79].

During the course of the trial and at the close of the case of the prosecution, petitioner was acquitted of the charge in Count I of the indictment [R. 1225, 1232]. By

a verdict of the jury, petitioner was found guilty of the offense charged in Count II of the indictment, and judgment was entered by the District Court upon such verdict [R. 137-138].

At the very outset of the trial of the cause in the United States District Court, it was stipulated and agreed, at the suggestion of the trial court, that any motion, objection or stipulation made by either defendant be deemed made on behalf of both defendants unless such motion, objection or stipulation is specifically disclaimed [R. 240-241], and it was expressly agreed and understood by and between the Court, counsel for the government, and counsel for the respective defendants throughout the trial of said cause and from the very commencement thereof, that all evidence offered by the government was offered and received against defendant Sam Ormont only, unless government counsel avowed or indicated that the evidence was offered against petitioner, or against both defendants [R. 347, 348, 355, 372, 378, 379, 380, 390, 448, 450, 451, 455, 602, 872, 968, 1044, 1080, 1081, 1086, 1100, 1143, 1144].*

During the trial of said cause, the government called as a witness, one William S. Malin, a certified public accountant, who was employed by Mr. Mirman, the then attorney for petitioner's co-defendant, Sam Ormont, to assist said attorney in handling the tax matters of petitioner and said Sam Ormont [R. 1090-1095]. Objections were interposed by petitioner to any and all testimony of said government witness, William S. Malin, on the ground

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*Excerpts from the transcripts illustrative of the agreement and understanding had throughout the trial and indicative of the tenor thereof, are set forth in APPENDIX A hereof.

that the information obtained by him was communicated to him by the attorney by whom he had been employed, and by petitioner to him as the employee of petitioner's attorney, and that all of said communications were confidential and privileged [R. 1108-1134].

Said objections were overruled, and said accountant permitted to testify both as to oral and written communications by petitioner and petitioner's attorney to him as the employee or agent of the attorney for petitioner [R. 1121-1130].

J. Bryant Eustice, an Internal Revenue Agent, called as a witness by the government, was permitted to testify over objection, that on the basis of an investigation made by him *ex parte* he determined that petitioner had received additional income for the year 1944 over and above that reported on his income tax return for that year [R. 953-956].*

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*Internal Revenue Agent Eustice, as his testimony is understood and construed by petitioner, did not actually testify that petitioner received additional income in the year 1944 over and above that reported by him for that year. His testimony, as interpreted by petitioner, actually was that on the basis of his investigation he had made a determination as to whether or not there was any additional income for the year 1944 over and above that reported by petitioner, but did not in his testimony at any time disclose what such determination was; that is, whether he had determined that there was such additional income, or whether he had determined that there was no such additional income. The Circuit Court of Appeals in its decision interpreted and construed his testimony conversely, declaring [R. 1690]: "On the basis of these investigations, Eustice determined that Himmelfarb had received additional unreported income for that year." Consequently, petitioner in this statement of facts and in all discussion pertaining to this phase of the case is adopting the construction placed on the testimony of Eustice by the Circuit Court of Appeals. In order, however, that this Court may determine for itself the true effect and extent of the testimony of Eustice anent this point, petitioner is setting forth in APPENDIX B hereof this phase of his testimony, and respectfully refers this Court thereto.

Eustice had previously established by his testimony that in his investigation he had referred to books and records which were not in evidence [R. 584; 587-590], and used such information, as well as information from dehors the record statements of other government agents [R. 589-592] in arriving at his conclusion and opinion that petitioner had received additional unreported income.

Eustice specifically disclaimed basing his computation or determination upon the bank records in evidence, and the only exhibits which were in evidence that Eustice took into consideration were petitioner's 1944 income tax return, Exhibit 4, and the partnership information return filed by petitioner and Sam Ormont, as joint venturers, for the fiscal period May 1, 1944 to April 30, 1945, Exhibit 6 [R. 591-592]. All other sources, information and records which furnished the basis for the opinion and conclusion were all matters dehors the record.

Eustice did not at any time state any amount which he computed or determined to be additional unreported income of petitioner for the year 1944. His testimony, construed in the strongest possible light against petitioner, was merely that he determined that petitioner had additional unreported income for said year, without any disclosure by him, or anyone else, whether such additional unreported income amounted to one cent, one dollar, or many thousands of dollars [R. 953-956].

The trial court, over the objection of petitioner, admitted in evidence Exhibits 32, 34, 35 and 36A, comprising bank records which were offered by the government and received upon the statement and assurance of government counsel that said exhibits would be "connected" or "tied up" [R. 384-386]. Not a single word of testimony was

at any time offered or received respecting these exhibits, save and except the testimony of the branch bank manager, who identified them as the records of said branch bank [R. 380, 388, 558-560].

No attempt was ever made by the government to connect these exhibits with the offense charged against petitioner, and petitioner, at the close of all of the testimony, moved to strike said exhibits from the record upon that ground, as well as upon other and additional grounds [R. 1363-1367]. This motion was denied by the Court.

The trial court permitted the jury to take all of the exhibits, including the aforementioned Exhibits 32, 34, 35 and 36A, to the jury room [R. 1591], and counsel for the government referred to these exhibits in his argument to the jury, stating in his opening argument [R. 1493]:

> "Besides that, you have in evidence here the bank records of Mr. Himmelfarb, which show you how much money got into his bank account,"

and in his closing argument [R. 1559]:

> ". . . How about his bank account. That is in evidence. Of course nobody testified as to those books. If the books show on their face what they purport to show, if the records are clear, you can't have testimony. The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

The trial court, over the objection of petitioner, admitted in evidence Exhibits 50A and 50B, which are identical statements of the net worth of petitioner as of April 30, 1945, except that Exhibit 50A is unsigned, whereas Exhibit 50B bears the signature of petitioner, preceded by the phrase: "The above statement is correct to the

best of my knowledge and belief" [R. 1108-1109; 1112-1114]. Because they are identical, these exhibits will be referred to as a single document.

The only testimony respecting the contents of this statement of net worth was given by William S. Malin, the certified public accountant employed by petitioner's attorney, who was called as a government witness [R. 1090-1095], and permitted, over objection, to testify that the amount shown thereon as cash on hand in banks, was obtained by him from bank balances, and other items shown thereon were obtained from petitioner's records, or based upon what petitioner told him [R. 1108-1134].

No attempt was made by the government to show that this statement of net worth was incorrect or untrue, or that any part or portion of petitioner's assets or liabilities, as of April 30, 1945, represented income of petitioner for the year 1944 in excess of the amount reported and upon which the tax was paid for said year, nor was any effort whatever made by the government to establish any connection between petitioner's statement of net worth as of April 30, 1945, or any of the assets or liabilities therein set forth, and the offense of which petitioner stood accused.

The trial court likewise permitted the jury to take these exhibits, 50A and 50B, to the jury room [R. 1591], and counsel for the government in his opening statement to the jury referred to these exhibits and expressly invited the jury to fasten guilt upon petitioner by speculation and con-

jecture, in the absence of relevant and cogent evidence of the period during and the manner by which such net worth was acquired [R. 1493].

Counsel for the government during the course of his closing argument to the jury, stated that two persons, to-wit: Mr. Malin and Mr. Moody, were accessible as witnesses to petitioner and were not called by petitioner, and inferred that they would have given testimony adverse and prejudicial to him if called [R. 1560-1561]. No evidence was ever presented nor was any showing made that Mr. Moody was accessible as a witness for petitioner, or at all.

Counsel for the government, in both his opening and closing argument to the jury, made repeated references of other alleged crimes and offenses purportedly committed by petitioner, of which there was no evidence against petitioner, and repeatedly stated to the jury that the sources of the alleged income upon which petitioner allegedly attempted to evade income taxes were overcharges, side payments, and extra payments, unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence against petitioner showing that any income received by him was received from overcharges, side payments, or extra payments in connection with the sale of meat, or any other unlawful transaction or transactions [R. 1470-1475; 1545-1547; 1560-1561].

Such further facts as may be necessary to a more full and complete understanding of the points raised or arguments advanced by petitioner are stated in the discussion of such points and contentions in the brief in support hereof.

Questions Presented.

The following are the primary questions presented by this petition:

(1) Are oral or written communications confidential and privileged when made by a client or his attorney to a certified public accountant employed by such attorney to assist him?

(2) May an Internal Revenue Agent testify to his conclusion and opinion that a taxpayer had additional income for a given year over and above that reported by such taxpayer, where such opinion and conclusion is not based substantially upon testimony adduced and exhibits received in evidence at the trial, but is based upon hearsay and other matters and things dehors the record?

(3) May a Circuit Court of Appeals disregard an agreement and understanding made and had between the trial court, counsel for the government, and counsel for the respective defendants, at the very commencement of and continuing throughout the trial of the case, that all evidence offered by the government and received in evidence was offered and received against one of two defendants only, unless government counsel avowed or indicated that the evidence was offered against the other of said two defendants or against both of said defendants, or is such agreement binding upon the Circuit Court of Appeals?

(4) (a) Is the error resulting from the misconduct of counsel for the government in stating to the jury in his closing argument, that two named persons were accessible to petitioner as witnesses, that said persons were not called by petitioner, and inferring that they would have given testimony adverse and prejudicial to petitioner if called, harmless error or prejudicial error, particularly where it

was not shown by any evidence of any character, with respect to one of such two named persons, that he was available or accessible to petitioner, or at all?

(b) Was counsel for the government guilty of misconduct constituting reversible error in making repeated reference in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by petitioner, of which there was no evidence against petitioner, and by repeatedly stating to the jury that the sources of the alleged income upon which petitioner allegedly attempted to evade income taxes were overcharges, side payments and extra payments, unlawfully collected and received in connection with the sale of meat, notwithstanding the fact that there was no evidence against petitioner showing that any income received by him was received from overcharges, side payments, or extra payments in connection with the sale of meat, or any other unlawful transactions?

(5) Is the admission in evidence of bank records of the accused, which are not in any way connected with the offense charged against the accused, error, and is such error reversible where counsel for the government predicates an argument to the jury upon such bank records, and such bank records are taken by the jury, with the permission of the trial court, to the jury room?

(6) Is the admission in evidence of a net worth statement of the accused error, where such net worth statement, or the assets and liabilities shown thereon, are not in any way connected with the offense charged against the accused, and is such error reversible where government counsel predicates argument to the jury thereon, and the jury, with the permission of the trial court, takes such net worth statements to the jury room?

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1) a. In holding that communicaions between a client or his attorney and an accountant employed by the attorney for such client are not privileged, the employment of an accountant being a mere convenience and not indispensable; and

b. That the client, being aware of the employment of such accountant by his attorney, by participating in joint meetings with his counsel and such accountant authorized the disclosures by the attorney to such accountant of confidential communications of the client to his attorney;

(2) In impliedly holding that an Internal Revenue Agent called as a witness for the government may state to the jury his conclusion and opinion, based upon books and records dehors the record and information from the hearsay statements of other government agents and formed as the result of an *ex parte* investigation by him, that the taxpayer had additional income in the year 1944 in excess of that reported by him in his tax return for such year; and in sanctioning such testimony by considering in its decision such conclusion and opinion of the Internal Revenue Agent;

(3) In disregarding the agreement and understanding made and had at the very outset of the trial of this case by counsel for the government, the trial court and counsel for the respective defendants, and continuing throughout said trial, that all evidence offered by the government and received in evidence was offered and received against one of two defendants only, unless government

counsel avowed or indicated that the evidence was offered against the other of such two defendants, or against both defendants, by:

a. Holding that because the two defendants were tried together, the two ran a business together, and for the most part acted jointly throughout, that, therefore, most of the evidence in the conduct of that business would be properly related to both defendants;

b. Considering against petitioner in its decision evidence which was admitted only against petitioner's co-defendant; and

c. Ignoring the fact that most of the evidence, including the evidence pertaining to the conduct of the business, was admitted only against petitioner's co-defendant, and only a very small part or portion of the evidence was admitted against petitioner.

(4) In holding that although counsel for the government in his argument should not have used the failure of petitioner to produce certain witnesses or to have drawn it to the jury's attention, because petitioner was in no way bound to produce them, such conduct did not constitute reversible error;

(5) In holding that the repeated references by counsel for the government in his opening and closing argument to the jury of other alleged crimes and offenses purportedly committed by petitioner, and by repeatedly stating to the jury that the sources of the income on which petitioner allegedly attempted to evade income taxes were overcharges, side payments, and extra payments unlawfully collected and received in connection with the sale of meat, did not constitute reversible error;

(6) In finding and holding that the admission in evidence, over objection of petitioner, of bank records which were not in any way connected with the offense charged but upon which counsel for the government predicated argument to the jury, was harmless error;

(7) In finding and holding that the evidence adduced against petitioner was sufficient to support the verdict and judgment, and in finding and holding that petitioner was lawfully convicted.

Reasons for Granting Writ.

(1) The Circuit Court of Appeals fell into serious error respecting an important and far-reaching principle of law in holding that communications by a client and the attorney for such client to a certified public accountant employed by the attorney are not confidential and privileged.

Such decision is contrary to and in conflict with the only adjudicated federal court case on the point, to-wit: *La Lance & Grosjean Mfg. Co. v. Haberman Mfg. Co.* (1898) (C. C. N. Y.), 87 Fed. 563, and is contrary to the law generally prevailing in the several states, as well as at common law;

(2) The Circuit Court of Appeals sanctioned, by considering and affirming the judgment thereon, testimony of an internal revenue agent stating his conclusion formed as the result of an *ex parte* investigation, and based upon hearsay and other matters dehors the record, that a taxpayer had received income for a given year in excess of that reported by petitioner in his income tax for such year. Such decision is a radical and dangerous extension of and a departure from the principle enunciated by this

court in *U. S. v. Johnson* (1942), 63 S. Ct. 1233, 319 U. S. 503, 519, that expert testimony in income tax cases directed to the primary issue upon which the jury must find, viz., whether there was additional unreported income, is admissible if the witness is qualified as an expert, and *based his opinions and conclusions upon testimony and exhibits in evidence*;

(3) The binding effect upon the Circuit Court of an agreement and understanding made and had between the trial court, counsel for the government and counsel for the respective defendants, made at the very outset and which continued throughout the trial of the cause, that all evidence offered by the government and received in evidence, was offered and received against one of two defendants only, unless government counsel avowed or indicated that the evidence is offered against the other of such two defendants, or against both defendants, goes to the very foundation of our criminal procedure. The disregard by the Circuit Court of Appeals of such agreement and understanding is contrary to the decisions of this Court in *Hackfeld & Co. v. U. S.* (1905), 197 U. S. 442, 446, 447, and *Pacific R. R. v. Ketchum* (1879), 101 U. S. 289, 296, and violative of every fundamental principle of American jurisprudence;

(4) The decision of the Circuit Court of Appeals that the error resultant from the misconduct of counsel for the government in stating to the jury in his closing argument that two named persons were accessible to petitioner as witnesses, that said persons were not called by petitioner, and inferring that they would have given testimony adverse and prejudicial to petitioner if called, was harmless error and not prejudicial, is contrary to and in

conflict with the earlier federal decisions of the Circuit Court of Appeals for the Sixth District, in *McKnight v. U. S.* (1899), 97 Fed. 208, that such a charge by the U. S. Attorney in his argument resulted in the deprivation of the presumption that the defendant was innocent, and is reversible error;

(5) The decision of the Circuit Court of Appeals that the admission in evidence, over objection, of bank records which were not in any way connected with the offense charged against petitioner, was not reversible error, is contrary to and in conflict with the decision of this court in *Williams v. United States* (1897), 168 U. S. 382, 395, *et seq.*, and the decision of the United States Circuit Court for the Tenth Circuit in *Kittrell v. United States* (1935), 79 F. 2d 259, 262;

(6) The Circuit Court of Appeals by its decision herein held that the admission in evidence, over objection, of petitioner's statement of net worth was not reversible error, but was pertinent in establishing an accumulation of income by petitioner.

Such holding was made notwithstanding the fact that no evidence was introduced to establish that any portion of petitioner's assets or liabilities shown by such statement of net worth reflected income of petitioner for the year 1944 in excess of the amount reported by him, or at all, or to establish any connection between petitioner's net worth as disclosed by such statement and the offense of which petitioner stood accused. The precise question

of admissibility of net worth statements in a prosecution for income tax evasion where there is a complete absence of evidence connecting such statements with the offense charged, appears never to have been determined, and presents an important question of federal law which should be settled by this Court.

The United States Circuit Court for the 8th Circuit in *Gleckman v. United States* (1935), 80 F. 2d 394, in considering the admissibility of evidence generally establishing that the accused was possessed of a substantial net worth, held that such fact alone did not give rise to a presumption or create any inference that the acquisition or possession of such net worth was the result of an evasion or attempt to evade the payment of income tax, which holding in its general tenor and effect is contrary to and in conflict with the result reached by the Circuit Court in the instant case.

Wherefore it is respectfully submitted that this petition for writ of certiorari be granted.

WILLIAM KATZ,

Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1949.

No. .....

PHILLIP HIMMELFARB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Circuit Court of Appeals Erred in Holding That a Communication by a Client or His Attorney to a Certified Public Accountant Employed by Such Attorney Was Not Confidential and Privileged.

The Circuit Court held that the testimony of William S. Malin, the accountant employed by petitioner's then attorney, Mr. Mirman, was not privileged and therefore admissible upon two grounds:

1. That "Malin's presence was not indispensable in the sense that the presence of an attorney's secretary may be; it was a convenience, which, unfortunately for the accused, served to remove the privileged character of whatever communications were made" [R. 1672]; and

2. That Himmelfarb, being aware of Malin's employment, by participating in one or more meetings with Malin and Mirman relative to his income taxes and signing some exhibits at Malin's request, thereby authorized the disclosures by Mirman to Malin [R. 1673].

In so holding the Circuit Court fell into serious error respecting an important and far-reaching principle of law, and rendered a decision directly contrary to the only adjudicated federal court case on the point, to-wit: *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.* (1898) (C. C. N. Y.), 87 Fed. 563, and contrary to the law generally prevailing in the several states, as well as at common law.

In that case it was held that the rules of privilege applicable to communications between attorney and client, or counsel and associate, govern communications of a party to patent litigation, or his counsel, with an expert in the art in question employed by the party to manage the litigation in his behalf, or with such an expert employed as assistant to counsel in so far as he acts as such assistant and not as a witness.

In that case the complainants had employed an expert to assist complainants in the presentation of their patent litigation. In determining whether or not a letter written by complainants to such expert was privileged, the Court declared:

> "In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the *alter ego* of the complainant; . . . So too, questions of science and art are frequently so mingled with questions of patent law, in controversies

arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such case it would seem fair to apply the same rule to the expert as to the counsel."

In *Walsham v. Stainton*, 71 Reprint 357, 2 Hem. & M. 1, it was directly held that communications by an attorney and the client to an accountant employed by the attorney were confidential communications and privileged as such, declaring:

> "The principle is established that where a person has occasion to employ a solicitor, and the solicitor, in order to enable himself to advise on the matter, calls in some other person to assist him and to give his opinion, such communications are as much privileged as if they came from the solicitor himself. In such a case the person called in (here it was an accountant) is *pro hac vice* the solicitor's clerk."

Indispensability of the clerk or agent is not the test which determines whether the communication is privileged or unprivileged, and the Circuit Court's conclusion that the presence of the accountant was a mere convenience which removed the privileged character of the communications, is contrary to precedent and unsupported in law.

It has been repeatedly held that the privilege extends to confidential communications between the client and the clerk or agent of the attorney, which, as hereinabove shown, includes an accountant.

Bowman v. Norton, 5 C. & P. 177, 24 E. C. L. 265, 172 Reprint 929;

Taylor v. Forster, 2 C. & P. 195, 12 E. C. L. 85, 172 Reprint 89;

Churton v. Frewen, 2 Dr. & Sm. 390, 62 Reprint 659, 670;

Steele v. Stewart (1843), 1 Phill. 471;

Parkins v. Hawkshaw (1817), 2 Stark Rep. 239;

Aluminum Co. of America v. Cold Metal Process Co., 7 F. R. D. 684;

Lewis v. United Airlines Transp. Co., 32 Fed. Supp. 21, 23;

Hawes v. State, 7 So. 302, 312, 88 Ala. 37;

Landsberger v. Gorham, 5 Cal. 450, 451, 452;

Indianapolis v. Scott, 72 Ind. 196, 204;

Sibley v. Waffle, 16 N. Y. 180, 183;

Brand v. Brand, 39 How. Pr. 193, 260, *et seq.*;

Jackson v. French, 3 Wend. 337, 20 Am. D. 699, 700;

Taylor on Evidence, 12th Ed., Vol. 1, p. 581;

Greenleaf on Evidence, 16th Ed., Vol. 1, p. 375.

See, also:

Hickman v. Taylor, 329 U. S. 495, 508, *re*: public policy involved in examinations of attorneys.

It will be noted by this Court that in *Churton v. Frewen,* 2 Dr. & Sm. 390, 62 Reprint 659, 670, the rule of privileged communications was held to apply to a translator of ancient documents, who was employed by the solicitor for that purpose; that in the *Lalance, etc. v. Haberman,* case, 87 Fed. 563, the privilege was held to apply to an engineer or patent expert employed by the party to assist in the preparation and presentation of its case.

Can it be said in this day and age of complex and manifold taxation, that a translator of ancient documents

is more indispensable and less of a convenience in a case requiring the services of such a translator than is an accountant in a case requiring the services of an accountant? Similarly, can this Court say that an engineer or patent expert is more indispensable and less of a convenience in a case requiring the services of such engineer or patent expert than is an accountant in a case requiring the services of an accountant? It should be remembered, moreover, that in *Walsham v. Stainton*, 71 Reprint 357, 2 Hem. & M. 1, the privilege was specifically held to apply to an accountant employed by an attorney.

The privilege likewise extends to confidential communications between the principal's attorney and the clerk or agent of such attorney, and prevents the agent, as well as the attorney from testifying thereto.

McFarlane v. Rolt, 14 Eq. 580, 27 Law Times Reports 305, 306;

Ried v. Langlois, 2 Hall. & T. 59, 73, 47 Reprint 1596, 1602;

Russell v. Jackson, 9 Hare 387, 41 Eng. Ch. 387, 68 Reprint 558, 559;

Webb v. Lewald Coal Co., 4 P. 2d 532, 214 Cal. 182, 187, 77 A. L. R. 675;

Philadelphia Fire Assn. v. Fleming, 3 S. E. 420, 422, 423, 78 Ga. 733;

Indianapolis v. Scott, 72 Ind. 196, 204;

Leyner v. Leyner, 98 N. W. 628, 629, 123 Iowa 185;

State v. Loponio, 88 Atl. 1945, 85 N. J. Law 357, 361, *et seq.*, 49 L. R. A. (N. S.) 1017;

LeLong v. Siebrecht, 187 N. Y. Supp. 150, 196 App. Div. 74, 76.

In none of the foregoing cases was indispensability of the presence of the clerk or agent declared to be or even mentioned as the test for the existence of the privilege, or mere convenience fixed or determined as the basis for the loss of such privilege, nor was the fact that the client was aware of the employment of the clerk or agent or participated in meetings or communicated with such clerk or agent, held to be a waiver of the privilege or an authorization to disclose the communications. As a matter of fact, such cases indicate that it is the awareness by the client of the existence of the relationship of clerk or agent in making the disclosure which furnishes the basis for the privilege.

Moreover, the question before the Court was not whether the "disclosures made by Mirman to Malin" were authorized by the accused, but whether Malin may without the consent of the accused testify to communications, either orally or in writing, made to him in confidence by the accused, or by Mr. Mirman, the then attorney for appellant.

Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. (following Sec. 687) provides:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Under the common law, as hereinbefore shown, the rule of privileged communications extended to clerks and agents of the attorney, which includes accountants when so employed by the attorney.

As indicated by the foregoing cases, the test that the Court should have applied in determining whether the communications to Mr. Malin were privileged, and therefore inviolate, was whether he was, in fact, an agent of the attorney for the accused. By failing to apply the proper test and by using a false and incorrect test or standard of measurement, the Court was led to a conclusion completely at variance with the adjudicated cases on this question and the law generally prevailing.

II.

The Court of Appeals Erred in Sanctioning and Considering the Opinion and Conclusion of an Internal Revenue Agent, Based Wholly Upon Matters Dehors the Record and Hearsay, and Formed as a Result of an Ex-parte Investigation That Petitioner Had Received Additional Unreported Income for the Year 1944.

The decision of the Court of Appeals affirmatively concedes that the opinion and conclusion of Internal Revenue Agent Eustice was formed as a result of an *ex parte* investigation by declaring [R. 1690]:

> "Mr. Eustice and Mr. Phoebus, agents for the Bureau of Internal Revenue, began investigations in November, 1945, to determine Himmelfarb's status with the Acme Meat Co., and whether he had paid the proper tax for the year 1944. On the basis of these investigations, Eustice determined that Himmelfarb had received additional unreported income for that year."

Moreover, the Court, impliedly at least, recognized such conclusion to be based upon hearsay and matters dehors the record, by the following statement, and particularly

the italicized portions thereof, quoted from its Opinion [R. 1691]:

> "Eustice, in determining that appellant had additional income for the year 1944, used information secured from his individual income return for that year, the 1945 partnership return, *investigation of the books and records of the Acme Meat Co., and information from the statements of other government agents.*"

This is true because:

a. No books or records of the Acme Meat Co. are in evidence in this case at all; no evidence respecting the contents of any books or records of Acme Meat Co. were admitted against petitioner, and the testimony of Mr. Eustice based upon his investigation of such books and records is, of necessity, a conclusion based upon matters and things dehors the record;

b. There are no "statements of other government agents" of any kind or character in evidence against petitioner, and information from the statements of other government agents is, and can only be hearsay as well as dehors the record.

The decision of the Court sanctioning an opinion and conclusion of an investigator based upon hearsay and matters dehors the record, directed to the primary issue upon which the jury was required to find as a fact, and the affirmance of the judgment upon such testimony, represents a radical and dangerous departure from established legal principles and precedents.

Expert testimony in income tax cases directed to the primary issue upon which the jury must find, viz., whether there has been additional unreported income, has been sustained by the Supreme Court of the United States upon the ground that the witness was qualified as an expert, *and based his opinions and conclusions upon the testimony and exhibits in evidence.*

United States v. Johnson, 63 S. Ct. 1233, 319 U. S. 503, 519.

The rule so enunciated by this Court has been followed in *Kirsch v. U. S.* (1949, 8th Cir.), 174 F. 2d 595, 601, wherein it was held proper to permit an expert to testify to what income taxes would be upon a hypothetical state of facts *which have been proven by competent evidence,* and that it was improper to base such conclusion on assumptions not in or contrary to the record.

No case has been cited by counsel for the government or any court below, and counsel for petitioner is convinced that no case can be found in which the opinions and conclusions of an investigator, formed as the result of an *ex parte* investigation, and based entirely or substantially upon hearsay and matters dehors the record, has been sanctioned or sustained. The admission of such testimony is so foreign to the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power of supervision and correction.

To permit such evidence to stand and to constitute the basis for a conviction in a criminal proceeding, and the affirmance of a judgment of conviction upon review by an appellate court, is violative of every fundamental principle of American jurisprudence.

III.

The Court of Appeals Erred in Disregarding the Agreement and Understanding Made and Had by Counsel for the Government, the Trial Court and Counsel for the Respective Defendants at the Very Commencement and Continuing Throughout the Trial of the Case, That All Evidence Offered by the Government and Received in Evidence Was Offered and Received Against One of Two Defendants Only, Unless Government Counsel Avowed or Indicated That the Evidence Was Offered Against the Other of Such Two Defendants, or Against Both Defendants.

There is and can be no dispute that this case was tried upon the agreement and understanding above-mentioned. Excerpts from the transcripts embodying the understanding and agreement, and illustrative and indicative of the tenor thereof, are set forth in Appendix A hereof.

Notwithstanding such fact, the Court of Appeals repeatedly referred to, considered, and applied against petitioner evidence which was not admitted against him, and which was not in the record at all as to him. The Court of Appeals went even further. It found and declared petitioner guilty by association. It said with respect to the two defendants [R. 1704]:

> "The two were trial [*sic.* tried] together and the two ran a business together, and for the most part acted jointly throughout so that most of the evidence in conduct of that business would be properly related to both defendants."

It thus shockingly appears that the Court considered the fact that the two defendants were tried together as an element determinative of the proposition that

most of the evidence would be properly related to both defendants, even though most of the evidence was not admitted against petitioner, but was expressly excluded from the record as to him.

Similarly, the Court considered the fact that the two defendants ran a business together as another element determinative of the proposition that most of the evidence would properly be related to both defendants, even though most of the evidence was not admitted against petitioner, but expressly excluded from the record as to him.

In short, notwithstanding the fact that the evidence respecting the conduct of the business operated by petitioner and Sam Ormont is not in the record against petitioner, the Court, in the face of the record and contrary to the most basic and inviolable legal principles, nonetheless applied against and related to petitioner all such evidence simply on the basis that the two defendants were tried together and ran a business together.

The Opinion of the Court is replete with instances in which it applied and considered as evidence against petitioner testimony which was not in the record at all as to him. Thus, the Court stated as a fact [R. 1648]:

> "The books of the Acme Meat Co. were kept on a calendar year basis."

The only testimony in the record respecting the basis, as to fiscal or calendar year, upon which the books of the Acme Meat Co. were kept, was that given by government witness Ernest Link, and the record with respect thereto discloses that petitioner's objection thereto was sustained by the trial court and such testimony expressly excluded as to petitioner [R. 450].

Again, the Court in its Opinion states as a fact [R. 1648]:

> "According to the evidence, income from sales of meat, made within ceiling prices under OPA, were reported on invoices and recorded in the company books and appellants' returns for 1944 were based on these figures. It is indicated that 'bonus' or 'overceiling' payments of additional cash sums paid by customers of Acme Meat Co. were received but not reported on the books nor were they reported for income tax purposes for the year 1944; as to all of which both appellants were well aware."

The only witness who testified respecting the phase of the case which in any way pertained to the matters stated as "facts" by the Court in the aforequoted portion of the Opinion, was government witness, Ernest Link. Only a meager portion of his entire testimony was admitted against petitioner [R. 429-436], and if such portion so admitted against this petitioner is properly delineated from the transcript, this Court must determine that the matters set forth by the Court as facts, in the aforequoted portion of the Opinion, are not borne out by or supported by the record.

A fair and accurate evaluation of such testimony discloses no evidence showing, or from which any inference can be drawn which will support such statement recited as a fact by the Court in its Opinion.

There is not a scintilla of evidence against petitioner respecting the prices or any other entries reported or made on any invoices, nor is there a shred of evidence that the invoices were or were not recorded in the company books. Likewise, there is not a particle of evidence that the returns of petitioner for the year 1944 were based on the

figures which were "recorded in the company books." Such statements in the Opinion of the Court were based wholly upon assumption, conjecture and speculation.

Similarly, there is not a shred of evidence in the record against petitioner showing, or from which an inference may be drawn respecting "bonus or overceiling payments." Such statement is based upon evidence which was not offered or received against petitioner.

The Court in its Opinion states [R. 1649]:

> "Further, there is testimony that income from certain sales was shown on invoices which were not transmitted to the appellants' bookkeeper and therefore were never entered nor included in the books from which the income returns were made. These unreported invoices or lists were kept in a desk drawer at the plant. There is also indication of some falsity in keeping of records which goes to the general intent of appellants to misrepresent their income."

The aforequoted statement of the Court is based upon testimony of government witness Ernest Link, and a reference to the record herein [R. 398-401; 414-417], will readily establish:

(1) That his testimony respecting the invoices referred to was not admitted against petitioner and is not in the record against him at all;[1]

(2) That the invoices referred to by the Court as "never entered or included in the books from

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[1]It must be remembered that the only evidence in the record against petitioner is such testimony and evidence as was specifically offered by the government and admitted by the court as against him.

which the income returns were made," were invoices of and for the year 1942, and had no connection whatever with income or returns of petitioner for the year 1944, or at all.[2]

The Court in its Opinion [R. 1649] makes the statement that:

> "Evidence is in the record of a partnership return declaring additional income of some $71,000.00, claimed to have come from the so-called 'Miscellaneous Enterprises,' bank records and bank documents pertaining to each appellant, records of business dealings, invoices, cancelled checks, transcripts of portions of the records of the Acme Meat Co. and bond records."

There is no evidence in the record against petitioner of any "invoices" or "transcripts of portions of the records of Acme Meat Co.," or "bond records."

Such statement of the Court is the result of the application by it to petitioner of evidence not in the record as to him, in disregard of the stipulation and understanding under and pursuant to which petitioner was tried.

This Court has held that a stipulation respecting evidence is binding on an appellate court, and that a Court of Appeals errs in disregarding such stipulation.

> *Hackfeld & Co. v. U. S.* (1905), 197 U. S. 442, 466, 467.

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[2]Petitioner was not in any way connected with the Acme Meat Company in the year 1942, and did not become connected therewith until about May 1, 1944 [R. 393, 397, 452, 454, 924-929].

See, also:

Pacific R. R. v. Ketchum (1879), 101 U. S. 289, 296.

The rule enunciated by this Court appears to be the general rule prevailing in the several states.

Willman v. Forster (1920), 46 Cal. App. 359, 361;

Pasco Holding Co. v. Wells (1936), 126 Fla. 339, 171 So. 674, 675;

Richenberg v. Capital Garage (1926), 68 Utah 30, 249 Pac. 121, 122;

Lewis v. Lanbros (1920), 58 Mont. 555, 194 Pac. 152, 153.

IV.

The Court of Appeals Erred in Holding That the Misconduct of Counsel for the Government in Arguing to the Jury That Petitioner Failed to Produce Certain Witnesses Did Not Constitute Reversible Error.

The Court of Appeals recognized the impropriety of the argument made by counsel for the government to the jury to the effect that Mr. Malin and Mr. Moody were accessible to petitioner as witnesses, were not called by petitioner, and inferring that they would have given testimony adverse and prejudicial to petitioner if called [R. 1560-1561].

This is manifest from the statement in the Opinion of the Court of Appeals [R. 1706]:

> "We do not think that counsel for government should have used this failure to produce certain witnesses or to have drawn it to the jury's attention, for he was in no way bound to produce them."

Such error is, however, excused by the Court because of a lack of objection and deemed to be unprejudicial.

The Court of Appeals correctly acknowledges that under the rule of *Skuy v. United States* (1919, 8th Cir.), 261 Fed. 316, error which is seriously prejudicial will be noticed in the absence of objection. The question then becomes one of whether or not such an error is seriously prejudicial. It has directly been held that an argument of government counsel calling the attention of the jury to defendant's failure to take the stand, is reversible error.

> *McKnight v. U. S.* (6th Cir.), 115 Fed. 972, 982;
> *Robilio v. U. S.* (6th Cir.), 291 Fed. 975, 985.

Secondly, an argument by counsel for the government that two persons were accessible as witnesses to petitioner and were not called by him, and implying and inferring that they would have given testimony adverse and prejudicial to petitioner if called, results in the deprivation of the presumption that the defendant is innocent, to the same extent and degree as does an argument directed to the fact that the defendant did not himself take the stand.

It has been decided that a charge by an assistant U. S. attorney in his argument respecting the failure of defendant to call witnesses in his behalf, resulted in the deprivation of the presumption that defendant was innocent.

> *McKnight v. U. S.* (1899, 6th Cir.), 97 Fed. 208, 211.

This Court has in two comparatively recent cases had occasion to consider the question as to whether error was harmless or prejudicial. In the most recent of these two cases, to wit: *Fiswick v. U. S.* (1946), 329 U. S. 211, the Court referred to its earlier but nevertheless late case of *Kotteakos v. U. S.* (1946), 328 U. S. 750, in which it reviewed the history and function of the "harmless error" statute (Jud. Code, Sec. 269, 28 U. S. C. 391), and quoted from its earlier case as follows (pp. 764-765):

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

See, also:

United States v. Negro (1947, 2d Cir.), 164 F. 2d 168, 171;

Bollenbach v. U. S. (1945), 326 U. S. 607, 615.

V.

The Court of Appeals Erred in Holding That Counsel for the Government Was Not Guilty of Misconduct in Referring to Other Asserted Offenses in His Argument to the Jury.

Counsel for the government, while purporting from the very outset of his argument to consider the cases of petitioner and Sam Ormont separately [R. 1450], in apparent recognition of the legal necessity for so limiting the evidence, however repeatedly referred to and applied against petitioner evidence which was not in the record against petitioner, and if in the record at all, was there only against his co-defendant, Sam Ormont [R. 1470-1473].

It will be observed that at the outset of the argument alluded to, the personal pronoun "he," referring to petitioner's co-defendant, Sam Ormont, is used. In the course of such argument, it will be noted, counsel for the government refers to [R. 1470]:

> ". . . this unreported additional amount, this extra money, this side money, which was split fifty-fifty, and the legitimate part being split on the basis Mr. Bircher and Mr. Phoebus told you."

This reference is and can only be a reference to petitioner as well as to Sam Ormont, and by such statement the jury was told that petitioner and Sam Ormont split "unreported," "additional," "extra," "side money," notwithstanding the fact that the record was wholly barren of any evidence that petitioner received money from such sources or money that may be so characterized. Not a particle of evidence was introduced against petitioner identifying the source of any funds received by him, or

the nature of the transactions in which such funds were earned.

Any doubt that the aforequoted portion of the argument of government counsel is directed against petitioner as well as Sam Ormont, although purportedly made against Sam Ormont, is dispelled by the immediately succeeding statements made by counsel for the government to the jury in which the singular "he" is changed to the plural form "they." The use of the pronoun "they" or "their" is almost continuous thereafter, with the result that the reference to highly prejudicial matters dehors the record that other unrelated offenses of which no evidence exists against petitioner, were committed by him.

The following statements are made as against petitioner with respect to which no evidence was offered or received against him, to wit:

(a) That a portion of the earnings of the joint venture, reported in Exhibit 6, the fiscal return for the period May 1, 1944, to April 30, 1945, was earned in the year 1944;

(b) That there are no books or records;

(c) That petitioner received money which he did not report;

(d) That petitioner received money which he knew was earned in 1944;

(e) That petitioner knew it was part of the Acme Meat Co.;

(f) That petitioner knew that such money was "side-money";

(g) That the return, Exhibit 6, is "phony, just a means of getting out of a trap"; or

(h) That such return was made "after they found that they were caught."

In that portion of the argument by counsel for the government which appears at pages 1473-74 of the transcript, there is a complete admixture of singular and plural pronouns containing a number of statements dehors the record as against petitioner, including the assertions that:

(a) Mr. Ormont went up to see Mr. Bircher and Mr. Phoebus and had a long discussion on the same day the fiscal return, Exhibit 6, was filed;

(b) That "they," which would include petitioner, "disclosed at that time what that money was";

(c) That at that time "they" told Mr. Bircher and Mr. Phoebus "they" were afraid of some other agency finding it out; and

(d) That is why "they" concealed it and why "they" did not report it.

The errors committed by counsel for the government in his opening argument were re-emphasized by him with deadly effect in his closing argument [R. 1545-1547], and the resultant prejudice became eradicable. At almost the commencement of his closing argument counsel for the government told the jury [R. 1545-1546], in effect, that the offense charged against petitioner was an offense relating to overcharges and the sale of meat, in that he told the jury that ". . . this is a simple case. It involves meat, the sale of meat by the Acme Meat Company, . . ." and "Besides that, on the other hand, they collected some more money . . .," ". . . it is overcharges, extra money on the side" [R. 1545-1546].

The record herein will be searched in vain for any evidence therein against petitioner pertaining to or supporting the statements repeatedly made by government counsel in his argument to the jury respecting the matters herein discussed.

Misconduct of counsel and improper argument in extreme cases warrants a reversal.

Berger v. U. S. (1935), 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629;

Williams v. U. S. (1897), 168 U. S. 382, 398, 42 L. Ed. 509, 18 S. Ct. 92;

Weathers v. U. S. (1941, 5th Cir.), 117 F. 2d 585, 586;

Ippolito v. U. S. (1940, 6th Cir.), 108 F. 2d 668, 670, 671;

U. S. v. Sprengel (1939, 3d Cir.), 103 F. 2d 876, 884;

Turner v. U. S. (1929, 8th Cir.), 35 F. 2d 25;

Fontanello v. U. S. (1927, 9th Cir.), 19 F. 2d 921;

Sischo v. U. S. (1924, 9th Cir.), 296 Fed. 696, 697;

Fitter, et al. v. U. S. (1919, 2d Cir.), 258 Fed. 567, 572.

Appellate courts must take cognizance of the fact that at times admonition will not remove the prejudicial effect of misconduct of counsel or improper argument addressed to the jury.

August v. U. S. (1918, 8th Cir.), 257 Fed. 388, 393;

Latham v. U. S. (1915, 5th Cir.), 226 Fed. 420;

Skuy v. U. S. (1919, 8th Cir)., 261 Fed. 316.

VI.

The Court of Appeals Erred in Holding That the Admission of Bank Records, Which Were Not in Any Way Connected With the Offense Charged, Did Not Constitute Error.

The opinion of the Court of Appeals respecting the admission in evidence of bank records is a maze of confusion and contradiction. The Court first states with respect thereto [R. 1700-1701]:

> "The bank records, over objection of Himmelfarb, were admitted to show income for the year 1944 and, along with other evidence in the case, constituted a part in the chain of circumstances proving guilt."

It would seem from such statement that the Court considered such evidence as being properly in the record and entitled to consideration as part of the circumstantial chain of proof.

In the two succeeding sentences, however, the Court declared:

> "Even if it were assumed to be error, it was harmless error and is not shown to have prejudiced the appellant. *Williams v. United States,* 168 U. S. 382, relied upon by appellant, holds that the admission of bank records without any evidence connecting the same with the offense charged is reversible error where accused may have been prejudiced thereby."

Not content to let the matter rest there, the Court in three sentences immediately following the declaration aforequoted, states [R. 1701]:

> "The government's argument before the jury claims that the records show how much money came into appellant's account. In considering the evidence,

it is doubtful whether the government properly connected this evidence with the offense charged; however, in the circumstances we do not find reversible error. Eustice, who examined the account, stated that he did not actually use it in the computation of the taxpayer's income as corrected, but only for informational purposes."

The record clearly reveals that the government did not connect even remotely the bank records with the offense charged, and the Court in its statement last aforequoted in effect concedes that fact. In such statement it likewise recognized that notwithstanding the non-existence of any connection between such bank records and the offense charged, the government argued such records to the jury. This fact created the very prejudice which the Court declared not to have been shown.

The basis upon which the Court finds the error to be non-prejudicial is that these records were merely admitted in evidence and argued to the jury, but that Eustice, the Internal Revenue Agent who examined the account, stated that he did not use them in the computation of the taxpayer's income as corrected, but only for informational purposes.

It appears to petitioner that the Court was wholly inconsistent in holding, as it did, that although it is doubtful whether the government properly connected up the bank records with the offense charged, any error in the admission thereof was harmless and not prejudicial because a government witness testified that he did not use them in the computations made by him, but that such evidence nonetheless constituted a part in the chain of circumstances proving guilt.

The admission of the bank records over objection, and the subsequent refusal to strike same upon motion of petitioner, cannot be justified on the basis of whether or not Mr. Eustice did or did not use such evidence in the computation of petitioner's income, but must be determined solely on the basis of whether the jury considered such evidence in arriving at their verdict, as the jury was urged to do by counsel for the government in his argument to them. Where, as in the instant case, a Court cannot say that a jury did not consider such evidence in arriving at its decision, such evidence must be deemed to be prejudicial.

Kittrell v. United States (1935, 10th Cir.), 79 F. 2d 259, 262; and *Williams v. United States* (1897), 168 U. S. 382, 395-397, flatly hold that the admission of bank records without any evidence connecting same with the offense charged, is error, and the decision by this Court holds that such error is reversible where the accused may have been prejudiced thereby.

It should be noted that the Court, in citing and quoting from *Gleckman v. United States,* 80 F. 2d 394, 399, to support its holding with respect to the admission of bank records in evidence, misapplied the law of that case to the facts of the instant proceeding. It was not shown in this case, as in the *Gleckman* case, that defendant was ". . . constantly, day by day and month by month, receiving moneys and depositing them to his account," nor was there any evidence in the case against petitioner, as in the *Gleckman* case, to prove that such deposits as were made represented income which was not accounted for, or income at all.

VII.

The Admission in Evidence of Net Worth Statements Which Were Not in Any Way Connected With the Offense Charged, Constituted Reversible Error.

The Court of Appeals by its decision herein, appears to justify the admission in evidence, over objection, of net worth statements notwithstanding the fact that same were not connected with the offense charged, upon the basis that [R. 1702]:

> "The trial court did not hold that the mere possession of assets was the basis for the verdict herein"; and
>
> "That net worth statements are pertinent in establishing an accumulation of income by Himmelfarb."

Petitioner is unable to comprehend the significance of the Court's statement that the trial court did not hold that the mere possession of assets was the basis for the verdict herein. There was never any occasion for the trial court to so hold, and there was no issue before the trial court respecting the basis for the verdict. What significance or importance the trial court attached to the net worth statements is of no moment whatever in this case. The real question is what significance or importance did the jury attach to these net worth statements?

Because a court is unable to probe the minds of the jurors and determine that question, the error in the ad-

missions of such statements, under the authorities, is real and prejudicial.

Fiswick v. U. S. (1946), 329 U. S. 211;

Kotteakos v. U. S. (1946), 328 U. S. 750;

United States v. Negro (1947, 2d Cir.), 164 F. 2d 168, 171;

Bollenbach v. U. S. (1945), 326 U. S. 607, 615.

A mere net worth statement in and of itself does not establish the source or origin of the assets shown, and consequently in and of itself is not pertinent in establishing an accumulation of income. That is true of the net worth statements, Exhibits 50 and 50A, received in evidence herein. Admittedly, there was no testimony respecting the source or origin, or the period during which the assets were acquired which are shown by and reflected in the statement of net worth.

The Court by its assertion in its decision herein, that the net worth statement [R. 1702] "is merely a part of the evidence which goes to show Himmelfarb's income in the general period involved," establishes that the Court of Appeals momentarily lost sight of, or misconceived the nature, purpose or effect of a net worth statement. A net worth statement does not show income at all, but merely assets, liabilities, and the excess of one over the other as of a given date.

VIII.

The Court of Appeals Erred in Finding and Holding That the Evidence Adduced Against Petitioner Was Sufficient to Support the Verdict and Judgment.

On May 24, 1945, there was filed with the Collector of Internal Revenue at Los Angeles, California, an Information Return by Sam Ormont and petitioner, as joint venturers, for the fiscal period May 1, 1944 to April 30, 1945, disclosing a net income of $71,338.84 for that fiscal period, and the distribution thereof to Sam Ormont and petitioner equally, to wit: $35,694.42 [Ex. 6, R. 383].

The fiscal period for which the Information Return was filed having ended on April 30, 1945, the tax on the income distributable to petitioner for such period was payable on or before March 15, 1946 (Internal Revenue Code, Sec. 188, 26 U. S. C. A. 188). Petitioner did so report such income [Ex. GG, R. 1265], and paid the tax thereon [R. 1280-1281].

The government's entire case against petitioner was predicated on the proposition that the income from the joint venture was improperly accounted for on a fiscal year basis, and the income therefrom should have been reported on a calendar year basis [R. 1471-1473; 1495; 1549; 1559]. Although the joint venture return, Exhibit 6, covered the fiscal period May 1, 1944 to April 30, 1945, no evidence whatever was introduced to establish when the $35,000.00 distributable to petitioner was earned

or received—whether earned or received in 1945 or 1944, or partly in one year and partly in the other. This fact was recognized by the Court of Appeals, which stated [R. 1675]:

> "There was no way of ascertaining directly what portion of the income came from the joint venture, which was improperly accounted for on a fiscal year basis rather than on a calendar year basis. The $35,000.00 received from the joint venture ran from May 1, 1944 to April 30, 1945."

The Court, in the next succeeding sentence with respect thereto said [R. 1675]:

> "Unless extraordinary circumstances indicated otherwise and there are none shown, the larger part thereof accrued during the calendar year of 1944."

In so holding the Court erred. An assumption may not be made in a criminal action that the larger, or any part, of a given sum accrued at or during any particular period. Such a fact must be proven by competent evidence.

Guilt may not be established by speculation or conjecture.

Karchmer v. U. S. (1932, 7th Cir.), 61 F. 2d 623;
Kassin v. U. S. (1937, 5th Cir.), 87 F. 2d 183, 184;
Denner v. U. S. (1945, 6th Cir.), 147 F. 2d 286.

Moreover, by the statement "Unless extraordinary circumstances indicated otherwise, and there are none shown," the Court shifted to petitioner the burden of the

government to prove every essential element of the offense charged. That such was and is the burden of the prosecution, and that the Court of Appeals by shifting same to petitioner, disregarded and deprived petitioner of his fundamental right to the presumption of innocence, is too elemental to require citation of authority.

No evidence whatever was introduced establishing any income of petitioner for the year 1944 in excess of that reported by him. The prosecution at the trial indulged in the same assumption as was erroneously adopted by the Court of Appeals as above stated [R. 1471-1473; 1495; 1549; 1559].

The government was required to prove as essential elements of the offense charged that both a tax in addition to what petitioner had paid for the year 1944 remained due and owing, and that such tax was substantially the amount alleged in the indictment.

Tinkoff v. U. S. (7th Cir.), 86 F. 2d 868;
Hargrove v. U. S., 67 F. 2d 820;
Gleckman v. U. S., 80 F. 2d 394;
U. S. v. Schenck, 126 F. 2d 702.

It failed to prove either.

Conclusion.

The questions presented by this petition are of vital concern to both the legal and accounting professions, are of highest importance to citizens and taxpayers, and profoundly affect the administration of justice in fundamental respects.

It is essential that the relationship of accountant to the attorney and taxpayer be determined, that the confidential and privileged nature thereof be declared, and basic problems in income tax cases, both substantive and procedural, be settled by the decision of this Court.

Wherefore it is respectfully submitted that this petition for certiorari be granted.

Dated: August 25, 1949.

WILLIAM KATZ,
Attorney for Petitioner.

APPENDIX "A."

Agreement and Understanding of Court and Counsel Respecting Admission of Evidence.

[Tr. p. 355]:

"Mr. Katz: If the court please, with respect to the defendant Himmelfarb, to avoid making the objection to each question as it is made, I think some stipulation will probably expedite the matter. I don't want to have to do that.

The Court: If it will be deemed that you have made the objection to all of the questions asked by government counsel without repeating it, and the same ruling made that I have made so far on these objections, unless government counsel avows that the evidence offered is offered also against Himmelfarb.

Mr. Katz: Thank you, Your Honor."

[Tr. pp. 378, 379]:

"Mr. Strong: Will counsel stipulate that we can use this photostat in lieu of the original card, that is, Government's Exhibit 25 for Identification, the signature card?

Mr. Robnett: Yes.

The Court: What is it?

Mr. Katz: That is a matter I am not concerned with, but it is still my understanding that until such time as you indicate that you are proceeding against the defendant Himmelfarb, you are proceeding against the defendant Sam Ormont.

Mr. Strong: Yes."

[Tr. p. 448]:

"Mr. Katz: That is objected to, if the Court please, on behalf of the defendant Himmelfarb, as not binding upon him in any way, and hearsay as to him.

The Court: The objection will be sustained. I take it, it will not be necessary at each session of the court to renew the understanding had by counsel, that this is offered only presently as against the defendant Ormont?

Mr. Strong: At the present time the understanding is the same.

The Court: Very well."

[Tr. p. 450]:

"Mr. Katz: Objected to, if the Court please, as to that question, in so far as the defendant Himmelfarb is concerned—

Mr. Strong: We have agreed as to each question. I have not mentioned his name.

The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness: On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb."

[Tr. p. 1086]:

"Q. (By Mr. Strong): You were asked concerning some invoices which you said you took. I will now show you invoices in evidence which are marked Government's Exhibits 38 and 39 and ask you if you took any one of these invoices.

Mr. Katz: If the Court please, I presume now we are reverting back to where the understanding is that the objection has been made and the same ruling with respect to further questions asked by Mr. Strong.

Mr. Strong: At the present time I am not applying it to the defendant Himmelfarb.

The Court: Very well.

Mr. Katz: He tells me when he is not but I can never tell when he is.

The Court: He is not except when he says he is.

Mr. Strong: That is right, Your Honor."

APPENDIX "B."

Excerpt From Testimony of Internal Revenue Agent, J. Bryant Eustice.

[Tr. pp. 953-956]:

"Q. Now, on the basis of the investigation which you made, as you have heretofore testified, did you determine whether or not there was any additional income for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on the income tax return of Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please. No foundation has been laid; it is incompetent, irrelevant and immaterial, and has no bearing upon any issue in the case. It calls for the conclusion of the witness; calls for hearsay; assumes facts not in evidence. With respect, if the Court please to the matter of that transcript, we object to the use of it as being a hearsay record of a hearsay record.

The Court: Let me hear the question again, will you, Mr. Reporter?

(Question read by the reporter.)

The Court: That calls for his conclusion. This witness is offered as an expert.

Mr. Strong: May I submit that these are questions which were asked as to the other defendant?

The Court: He did not object.

Mr. Strong: This is just preliminary.

The Court: The objection will be overruled, and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question.

Mr. Strong: I will incorporate that language into my question, if I may.

The Witness: The answer is yes."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	3
Conclusion	6

CITATIONS

Cases:

Care v. *United States*, 159 F. 2d 464, certiorari denied, 331 U. S. 847 3,5

Cooper v. *United States*, 9 F. 2d 216 3

United States v. *Johnson*, 319 U. S. 503 5

Statute:

Internal Revenue Code, Sec. 145 (26 U. S. C. 1946 ed., Sec. 145) 2

857491—49

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 295

PHILLIP HIMMELFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1646–1707) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction of petitioner was entered June 3, 1949 (R. 1708), and an order denying petitioner's petition for a rehearing was entered August 1, 1949 (R. 1710). A petition for a writ of certiorari was filed August 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Was the evidence sufficient to support the conviction?

2. Was the testimony of petitioner's accountant privileged?

3. Did the trial court erroneously admit opinion testimony of a Government witness?

4. Did the Court of Appeals erroneously disregard a stipulation observed during trial between the trial court and counsel relating to the separate application of evidence to the petitioner?

5. Was the argument for the Government, to which no timely objection was made, prejudicial?

6. Was it error to admit in evidence bank records of the petitioner and a net worth statement submitted by him?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other

penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

The facts are set forth in the Government's brief in the companion case of *Ormont* v. *United States,* No. 296, filed simultaneously herewith. Such additional facts as are pertinent to the issues raised by petitioner Himmelfarb will be briefly stated in the Argument.

ARGUMENT

1. The petitioner contends that the evidence was insufficient to support his conviction, asserting that it is not shown what portion of the $35,694.42 admittedly received by him between May 1, 1944 and April 30, 1945 was received in the calendar year 1944. (Pet. 13; Br. 43–45.) Since the accumulation of the total sum commenced early in 1944 and went on during eight months of that year (Govt. Ex. 50–C, 50–D), the inference that some portion of the total was received in 1944 is inescapable. *Cave* v. *United States,* 159 F. 2d 464, 468 (C. A. 8), certiorari denied, 331 U. S. 847; *Cooper* v. *United States,* 9 F. 2d 216, 224 (C. A. 8). The record contains much other competent evidence, which was reviewed by the court below

5. Like Ormont, this petitioner makes complaint of allegedly improper remarks by counsel for the Government. (Pet. 8, 9; Br. 31.) The court below read the argument in its entirety and found nothing upon which to base a reversal. (R. 1703–1704.) The petitioner made no objection at the time to the remarks of which he now complains. There is plainly no reason for this Court to review the question.

6. The petitioner complains finally of the admission of various bank records and a net worth statement. (Br. 38, 41.) The court below dealt adequately with these objections (R. 1700–1702), and it is plain that they present nothing calling for review by this Court.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
JAMES M. MCINERNEY,
ELLIS N. SLACK,
JOSEPH W. BISHOP, Jr.,
FRED G. FOLSOM,
Special Assistants to the Attorney General.

OCTOBER, 1949.

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